MOTION FILED

No. 80-519

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NELSON OIL COMPANY, INC.,

Petitioner,

v.

SHELL OIL COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

MOTION FOR LEAVE TO FILE AND BRIEF OF INDEPENDENT TERMINAL OPERATORS ASSOCIATION AS AMICUS CURIAE

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MOTION OF INDEPENDENT TERMINAL OPERATORS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Independent Terminal Operators Association ("ITOA") respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* in support of the petition herein for a writ of certiorari to the Temporary Emergency Court of Appeals of the United States. The consent of the petitioner herein has been obtained. The respondent herein has declined to consent to this motion.

ITOA is an organization of independent terminal operators which are non-branded independent marketers

of refined petroleum products. ITOA's members are vitally concerned with the proper enforcement, application and interpretation of the Emergency Petroleum Allocation Act, 15 U.S.C., *et seq.* ("EPAA") and related statutes.

As purchasers and resellers of motor gasoline, a product which is subject to the provisions of the Mandatory Petroleum Allocation Regulations, 10 C.F.R., Part 211, the members of ITOA have a strong interest in assuring effective and even-handed application of those regulations. The members of ITOA believe that the interpretation of the provisions of 10 C.F.R. §211.13(f) made by the courts below will have a substantial detriment to their right to be supplied with motor gasoline by major refiners, such as respondent. Thus, the members of ITOA have a direct and immediate interest in the outcome of this petition.

WHEREFORE, movant respectfully prays that this Court enter an order granting it leave to file its brief as *amicus curiae* in support of the petition for a writ of certiorari herein.

Respectfully submitted,

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November 3, 1980

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U.S. Department of Energy, Assistant Secretary for Policy Evaluation, *The State of Competition in Gasoline Marketing, Part I: The Effects of Refiner Operation at Retail* 20 (1980) 9

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BRIEF OF INDEPENDENT TERMINAL OPERATORS ASSOCIATION AS AMICUS CURIAE

INTEREST OF AMICUS

Independent Terminal Operators Association ("ITOA") is a trade association composed of independently owned terminal operators which purchase and resell petroleum products. The members of ITOA historically have been supplied at wholesale with products by major refiners and resold such products on a non-branded basis both to wholesale and retail purchasers and to consumers. As a result of the Mandatory Petroleum Allocation

Regulations, 10 C.F.R., Part 211, ("the Regulations") such supplier-purchaser relationships have been required to be maintained with respect to motor gasoline.

The members of ITOA are gravely concerned that the outcome of the decisions reached by the courts below will be to impose upon purchaser-resellers, such as themselves, a duty to downwardly adjust their allocation entitlements whenever their own customers decline to purchase product even though their supply obligations have not been terminated by the Department of Energy ("DOE"). The net effect of the decisions below is that Nelson's base period customers continue to have an entitlement to obtain supply from Nelson, but Nelson has been deprived of its own entitlement to receive product from Shell with which to satisfy Nelson's obligations to its own base period customers. The members of ITOA believe that such a result is contrary both to the letter and to the intent of the Regulations. Moreover, the members of ITOA believe that the responsibility for administering the Regulations and for balancing the various competing public and private interests involved rests with DOE, and that the courts are an inappropriate forum to terminate allocation rights and obligations.

SUMMARY OF ARGUMENT

The courts below misinterpreted the "downward" certification requirements of 10 C.F.R. §211.13(f) because that provision applies only in instances where a wholesale purchaser-reseller's obligations to its own customers have been terminated by DOE action. The effect of the decisions reached below could be to deprive wholesale purchaser-resellers of their supply entitlements without any dimunition in their obligations to supply their own customers. Moreover, the result reached by the

courts below is totally undermined by contemporaneous DOE pronouncements that there is no downward certification requirement in existing regulations.

ARGUMENT

I.

THE COURTS BELOW MISINTERPRETED THE APPLICABLE REGULATIONS

The Temporary Emergency Court of Appeals ("TECA") affirmed the district court's conclusion that 10 C.F.R. §211.13(f) imposed an obligation upon Nelson to "downward certify" its base period use from Shell merely by reason of the fact that Nelson's assigned customers did not purchase all of their supply entitlements from Nelson on a regular basis. (Appendix 20A-31A; 19C-20C). *Amicus* respectfully submits that the holding of the courts below was erroneous and that this Court ought to grant the petition for certiorari in order to correct such error.

The Regulations establish a series of supply obligations and purchase entitlements pursuant to which motor gasoline is allocated among various levels of distribution in the gasoline industry and ultimately to the consuming public. The Regulations require suppliers to allocate motor gasoline to purchasers to which they have a supply obligation, including purchasers which are assigned to them by DOE. 10 C.F.R. §211.10(a)(1) and (b)(2)(i). The Regulations establish certain purchase *rights* for purchasers, but impose no purchase *obligations*. 10 C.F.R. §211.12(a). The Regulations further provide that a purchaser may be deprived of its allocation entitlements only if such entitlements are transferred to a successor entity or if the purchaser goes out of business. 10 C.F.R. §211.11(c) and (d).

Nelson received from DOE a series of "assignments" obligating it to supply motor gasoline to certain new customers. Pursuant to the Regulations, Nelson submitted to Shell "upward" certifications of its allocation entitlements from Shell in order that Nelson could have supply entitlements to correspond to its supply obligations to such newly assigned customers. Pursuant to 10 C.F.R. §211.13(c), a wholesale purchaser-reseller's purchase of entitlements from its supplier may be increased in order to account for increases in the wholesale purchaser-reseller's supply obligations to its own customers. The purpose of this provision of the Regulations is to provide a mechanism by which wholesale purchaser-resellers can assure that new customers, the assignment of which results in an increase in the wholesale purchaser-reseller's obligations, will be able to receive an equitable volume of gasoline under the allocation program.

The pivotal question in this case is whether Nelson was required to "downward certify," or permanently reduce, its supply entitlement from Shell when its DOE-assigned customers failed to purchase their full supply entitlements in a given period of time. Pursuant to 10 C.F.R. §211.13(f), an applicant for an upward adjustment of its base period volume must file a statement "that if its needs decline, the purchaser shall file an amended application for a downward adjustment to its base period use." (Appendix 2J).

The term "needs" is not defined in the Regulations. However, the only rational interpretation of that term, and the interpretation consistently applied by DOE, is one that equates "needs" with supply *obligations*. However, the courts below held in effect that Nelson had a self-executing regulatory duty to make a permanent downward adjustment of its supply entitlements from

Shell merely by reason of the fact that Nelson's assigned customers did not purchase all of their base period entitlements from Nelson on a regular basis, notwithstanding the fact that Nelson remained under a continuing supply obligation to those customers. Such an interpretation is incompatible with the regulatory program, and if sustained would deprive wholesale purchaser-resellers and their assigned customers of the very protection which the regulations are designed to afford them.

The use of the term "needs" in Section 211.13(f) as synonomous with "supply obligation" reflects the requirements of a regulatory system in which (1) suppliers must make specified volumes of gasoline available to a particular customer upon that customer's demand; and (2) such customer has no obligation to purchase the volumes of gasoline to which it is entitled. If sustained, the interpretation reached by the courts below of the term "needs" as being synonymous with physical supply would eliminate the ability of a purchaser-reseller to fulfill its supply obligations.

The effect of the holding of the courts below is that a purchaser-reseller may be required to reduce its own entitlements on a permanent basis but is left with base period obligations to its own customers and no corresponding entitlement to purchase from its own supplier. This is true because of the fact that a demand by a customer that its supplier provide its supply entitlement is *not* one of the conditions which under Section 211.13(c) entitles that supplier to an upward adjustment. If a customer to which a supplier has a supply obligation but which has elected for a period of time not to exercise its purchase rights seeks to purchase its supply entitlement, the supplier is obligated to provide it. Thus, if a purchaser-resller were required to apply for a downward

adjustment whenever a customer to which it owes a supply obligation elects not to exercise its purchase rights for a period, it would be rendered incapable of fulfilling that supply obligation in the manner contemplated by the Regulations when that customer subsequently does exercise its purchase rights. Such a construction would yield an absurd result.

S :tion 211.13(f) must be interpreted to mean that a wholesale purchaser-reseller's "needs decline" only if its obligations to its own customers decline. These obligations decline only as a result of a termination or partial termination of the purchaser-reseller's base period supplier-purchaser relationship. These obligations are terminated neither by underlifting nor by consent, but only by affirmative action of DOE.

Indeed, the Regulations specifically provide that supplier-purchaser relationships may be terminated only upon express written approval of the DOE. 10 C.F.R. §211.9(a)(2)(i). Because so many public and individual interests are implicated by the creation and termination of such relationships, DOE must apply its specialized expertise in determining whether and under what conditions such relationships may be terminated. DOE will not terminate a supplier-purchaser relationship solely on the basis of the perceived equities as between a particular supplier and purchaser. Rather, the decision must be based upon due consideration of all of the underlying statutory and regulatory objectives involved. Such determinations cannot be made by the courts, but only by the agency which has the expertise to do so. *See Texaco, Inc.*, 3 DOE ¶81,025 (1979), where DOE declined a supplier's request to terminate a supplier-purchaser relationship, even though the purchaser had been guilty of fraud, on the grounds that to permit such a termination

would frustrate important regulatory objectives and impose hardships on all downstream purchasers.

Because the holdings of the courts below have the effect of terminating a substantial portion of a wholesale purchaser-reseller's base period entitlements, but completely disregard the impact and implications for all downstream purchasers to whom that purchaser-reseller continues to have a base period obligation, the result reached in this case will have a substantial adverse impact upon ITOA's members and their customers. For these reasons, *amicus* respectfully submits that the petition for a writ of certiorari should be granted.

II.

THE DEPARTMENT OF ENERGY HAS STATED THAT EXISTING REGULATIONS DO NOT IMPOSE A DOWNWARD CERTIFICATION REQUIREMENT

DOE and its predecessors have consistently recognized that a customer's non-use of its allocation entitlement ("underlifting") does *not* reduce or extinguish that customer's entitlements or its supplier's supply obligations. For example, in 1977, DOE's predecessor, the Federal Energy Administration ("FEA"), issued a proposal to amend the Regulations in order to provide for an "updated base period" and thus cause supplier base period obligations to reflect more current supply and demand patterns. 42 Fed. Reg. 20,826 (April 22, 1977). In so doing, FEA clearly recognized that, under the Regulations as they then existed, a supplier continued to have base period supply obligations and corresponding entitlements to obtain supply from its supplier, notwithstanding the fact that the purchasers to whom the supplier had base period supply obligations did not lift some or all of their entitlements. Subsequently, in 1979,

when DOE updated the motor gasoline allocation base period from the preexisting 1972 base period, it did so partially in recognition of the fact that previous base period obligations did not accurately reflect actual lifting patterns. 44 Fed. Reg. 11,202 (Feb. 28, 1979). Thus, DOE and its predecessors have recognized that "underlifting" by a purchaser does not, in itself, terminate the base period supply obligation of a supplier. Indeed, respondent Shell was granted temporary exception relief from its base period supply obligations in recognition of the fact that the Regulations did not provide for reduction in a supplier's obligations as a result of underlifting. *Shell Oil Co.*, 3 DOE ¶81,059 (1979).

This fact has been explicitly recognized by DOE in several instances. In a letter to Senator Henry M. Jackson, Chairman of the Senate Committee on Energy and Natural Resources, David J. Bardin, Administrator of DOE's Economic Regulatory Administration, stated:

> Since our regulations do not specifically require a decrease in allocation to the wholesale-reseller if a retail dealer goes out of business, the jobbers supplying retail outlets that have gone out of business are able to distribute an increased volume of gasoline among other customers and among retail outlets they operate.

S. Comm. on Energy & Natural Resources, S. Rep. 95-731, 95th Cong., 1st Sess. 59 (1978) (Appendix A hereto, at 1a). At the same time, DOE's Office of Fuels Regulation of the Economic Regulatory Administration stated:

> Present DOE regulations require prior suppliers to make an additional assignment of gasoline to a wholesale-reseller whenever an allocation for a retail outlet is approved. Since there is no require-

> ment for a decrease in allocation if the wholesale-reseller supplied retail dealer goes out of business, the wholesale-resellers using retail outlets have been able to redistribute an increased volume of gasoline among their customers and also among their own retail outlets.

U.S. Department of Energy, Economic Regulatory Administration, *An Analysis of the Relative Competitive Position of Marketers of Motor Gasoline* 22 (1978) (Appendix B hereto, at 5a).

More recently, DOE's Office of Competition stated:

> Suppliers receiving assignments of new accounts (including jobbers who serve as "willing suppliers" for new outlets they own themselves) may upwardly certify those additonal volumes to their supplier for an adjustment of their own base-period volumes. There is no corresponding downward certification requirement when an outlet goes out of business; however, a marketer is required to distribute a closed outlet's volumes to all of its other customers and offer surplus product to existing purchasers before other disposition is made of the product.

U.S. Department of Energy, Assistant Secretary for Policy Evaluation, *The State of Competition In Gasoline Marketing, Part I: The Effects of Refiner Operation at Retail* 20 (1980) (Appendix C hereto, at 7a).

Since DOE has so frequently stated that there is no requirement of downward certification, the interpretation of Section 211.13(f) made by the courts below is completely unsupportable. The result could be highly deleterious to the Congressionally-mandated directive that the Regulations provide, "to the maximum extent practicable," for the "preservation of an economically sound and competitive petroleum industry . . . and to

preserve the competitive viability of . . . nonbranded independent marketers." 15 U.S.C. §753(b)(1)(D). Moreover, Congress has granted to DOE and its predecessors discretion to fashion the allocation program and modifications thereto and to make particular exceptions from its requirements. DOE has consistently held that there is no requirement of downward certification. Yet the courts below have interpreted Section 211.13(f) in a manner so as to impose such a requirement. Such a result is potentially chaotic and is directly contrary to that intended by Congress when it enacted the statutory framework requiring the allocation of motor gasoline. For these reasons as well, *amicus* respectfully prays that the petition for a writ of certiorari be granted.

CONCLUSION

Amicus respectfully prays that the petiton for a writ of certiorari be granted and that the judgment below be reversed.

Respectfully submitted,

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November 3, 1980

By: _____

APPENDIX A

SENATE

Calendar No. 670

95th Congress - 2d Session

Report No. 95-731

PETROLEUM MARKETING PRACTICES ACT

April 10 (legislative day, February 6), 1978. – Ordered to be printed

Mr. Jackson, from the Committee on Energy and Natural Resources, submitted the following

REPORT

together with

MINORITY AND ADDITIONAL VIEWS

[To accompany H.R. 130]

* * *

[59]

Department of Energy,
Washington, D.C., March 20, 1978

Hon. Henry M. Jackson,
Chairman, Committee on Energy and Natural Resources, U.S. Senate, Washington, D.C.

Dear Mr. Chairman: In response to concerns expressed by Senator Haskell in conversations with the Federal Energy Administration's (FEA) Administrator John F. O'Leary concerning conditions in the gasoline marketplace, the staff of the FEA undertook to develop an analysis of the relative competitive position of the various categories of motor gasoline marketers. We have completed this analysis and I am providing you a copy of the staff study that was prepared for your use.

Our staff study was unable to address fully the market shares of the various marketing groups due to a lack of requisite data regarding the wholesale-reseller level of marketing. The data elements that we have been collecting up to now are designed to enable us to monitor and analyze the sale of gasoline by refiners and by retailers. The data are not sufficiently comprehensive to enable us to analyze the sale of gasoline at the wholesale-reseller level. As the staff study indicates, this category of marketers has recently increased its marketing activity.

The study, based primarily on sales volume data, indicates that there have been some shifts in the market shares of the various marketing segments over the past several years. The reasons for these shifts are not disclosed by the available data. The relative competitive viability of the marketing sectors can likewise not be ascertained from available data. In general, the shifts appear to be resulting from market forces operating in the context of the existing regulatory framework, as well as from certain aspects of the regulations.

For example, in conducting this analysis we determined that a provision of our regulations may be contributing to certain anomalies in the gasoline marketplace. Our regulations require prime suppliers to make additional assignments of gasoline to a wholesale-reseller whenever an allocation for a retail outlet is approved. Since our regulations do not specifically require a decrease in allocation to the wholesale-reseller if a retail dealer goes out of business, the jobbers supplying retail outlets that have gone out of business are able to distribute an increased volume of gasoline among other customers and among retail outlets they operate.

I particularly call your attention to the following points contained in the Executive Summary of the analy-

sis, which may be helpful in your further consideration of "dealer day in court" legislation.

The volume of gasoline sold by all (major and non-major) refiners to their open and lessee retail dealers declined 11 percent from 1972 to 1976, while refiners increased their sales to all other classes of gasoline marketers.

The volume of gasoline sold by all refiners through their salaried retail outlets increased by 69 percent from 1972 to 1976.

[60] The volume of gasoline sold by small refiners (those with refining capacities under 175,000 barrels per day) through their salaried retail outlets increased by 86 percent from 1972 to 1976.

The number of salaried retail outlets of refiners with capacities in excess of 100,000 barrels per day increased by 27 percent from 1974 to 1976, with five of those refiners increasing the number of their salaried retail outlets by 70 percent over those 2 years.

A further analysis of motor gasoline marketing is contained in the FEA's Findings and Views Concerning the Exemption of Motor Gasoline From the Mandatory Petroleum Allocation and Price Regulations (September 1977), a copy of which is also enclosed. That analysis concluded competition and market forces would adequately protect consumers following the proposed decontrol of gasoline and that the positive effects of increased competition would also facilitate the preservation of an economically sound and competitive petroleum industry.

I would be pleased to discuss these analyses with you or have my staff meet with yours to discuss our findings in more detail.

Sincerely,

David J. Bardin,
Administrator,
Economic Regulatory Administration.

Enclosures.

APPENDIX B

An Analysis of the Relative Competitive Position of Marketers of Motor Gasoline

U.S. Department of Energy
Economic Regulatory Administration
Office of Fuels Regulation

MARCH, 1978

* * *

[22] Present DOE regulations require prime suppliers to make an additional assignment of gasoline to a wholesale-reseller whenever an allocation for a retail outlet is approved. Since there is no requirement for a decrease in allocation if the wholesale-reseller supplied retail dealer goes out of business, the wholesale-resellers losing retail outlets have been able to redistribute an increased volume of gasoline among their customers and also among their own retail outlets. The branded independent dealers allege that this redistribution of gasoline by the wholesale-resellers places them in an unfair competitive position when competing at the retail level. This "upward certification" provision of the regulations may have created some market share distortions.

* * *

APPENDIX C

DOE/PE-0019
Vol. 1 (of 3 Volumes)

Part I
The State of Competition in Gasoline Marketing

The Effects of Refiner Operation at Retail (A Study Required by Title III of the Petroleum Marketing Practices Act)

Published May 1980

U.S. Department of Energy
Assistant Secretary for Policy and Evaluation
Office of Competition
Washington, D.C. 20585

Part I
The State of Competition in Gasoline Marketing

The Effects of Refiner Operation at Retail (A Study Required by Title III of the Petroleum Marketing Practices Act)

Published May 1980

Prepared by:
Dr. James B. Delaney
Dr. Robert N. Fenili

Under the Direction of:
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U.S. Department of Energy
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* * *

[20] Suppliers receiving assignments of new accounts (including jobbers who serve as "willing suppliers" for new outlets they own themselves) may upwardly certify those additional volumes to their supplier for an adjustment of their own base-period volumes.[4] There is no corresponding downward certification requirement when an outlet goes out of business; however, a marketer is required to distribute a closed outlet's volumes to all of its other customers and offer surplus product to existing purchasers before other disposition is made of the product.[5] (DOE has proposed amendments to the allocation regulations which, if adopted, would require some form of downward certification either upon station closings or at the time a firm upward certifies additional volumes.[6] To date, no final rule has been adopted.)

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[4] 10 C.F.R. Sections 211.13 and 211.105.

[5] 10 C.F.R. Section 211.106, Subpart A generally, and 10 C.F.R. Section 211.10(f) and (g)(5).

[6] 44 F.R. 69962 (December 5, 1979).

* * *